Performance Friction Corporation *and* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), AFL–CIO. Cases 11–CA–16040 and 11–CA–18044

April 22, 2003

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND ACOSTA

On November 30, 1995, the National Labor Relations Board issued a Decision and Order directing, inter alia, that the Respondent, Performance Friction Corporation (the Respondent or PFC), make whole certain discriminatees, including Martha Hinson, Jerry Kennedy, and Manual Mantecon. *Performance Friction Corp.*, 319 NLRB 859 (1995). On June 30, 1997, the Court of Appeals for the Fourth Circuit affirmed the Board's conclusions of violation, but remanded the case to the Board to tailor a narrower remedy. *Performance Friction Corp. v. NLRB*, 117 F.3d 763.

On September 18, 1998, the Board's Region 11 issued a compliance specification, which was amended on November 24, 1998. Following a hearing on the compliance specification, Administrative Law Judge Richard J. Linton, on October 28, 1999, issued a supplemental decision. The Respondent filed exceptions to that decision. On September 20, 2001, the Board issued a Supplemental Decision and Order Remanding. In its Supplemental Decision, the Board rejected several of the Respondent's defenses—including the defenses that the discriminatees failed to mitigate damages, and that their wages and benefits should be based on "individual" versus "comparable employees" work histories. The Board also remanded this proceeding to Region 11 for further appropriate action, including the issuance of a new backpay specification recalculating the backpay for Hinson, Kennedy, and Mantecon in accordance with specific instructions. *Performance Friction Corp.*, 335 NLRB 1117 (2001).[1]

On February 28, 2002, the Regional Director for Region 11 issued a second amended compliance specification. As a result of controversy arising over the amount of backpay and benefits due under the Board's Supplemental Order, the Regional Director, on August 16, 2002, issued a third amended compliance specification.

On September 5, 2002, the Respondent filed its answer to the third amended compliance specification. In its answer, the Respondent "admits that the recalculated backpay for Hinson, Kennedy, and Mantecon as set forth in the Third Amended Compliance Specification is consistent with the Board's instructions. However, Respondent denies that Hinson, Kennedy, and Mantecon are entitled to any backpay." The Respondent then responded to each of the compliance specification's 18 paragraphs.

On September 13, 2002, the General Counsel filed a Motion for Summary Judgment. In support of its motion, the General Counsel argues that paragraphs 1 through 18 of the third amended compliance specification should be deemed admitted as true in light of the Respondent's admission that the entire backpay recalculations set forth in that specification are consistent with the Board's instruction issued in its Supplemental Decision and Order Remanding. Thus, the General Counsel argues that it is entitled to summary judgment as a matter of law.

On September 17, 2002, the Respondent filed a memorandum in opposition to General Counsel's Motion for Summary Judgment. In its memorandum in opposition, the Respondent acknowledges that its answer admitted that the recalculated backpay for Hinson, Kennedy, and Mantecon as set forth in the third amended compliance specification was consistent with the Board's instructions. However, the Respondent argues that its answer also expressly denied that Hinson, Kennedy, and Mantecon were entitled to any backpay. The Respondent attached to its memorandum in opposition to the General Counsel's Motion for Summary Judgment a copy of the brief it had previously filed in support of its exceptions to Judge Linton's 1999 supplemental decision.

On September 18, 2002, the Board issued an order transferring proceeding and Notice to Show Cause why the General Counsel's motion should not be granted. On September 24, 2002, the Respondent filed a letter requesting that the Board accept its September 16, 2002 memorandum in opposition as its response to the Board's Notice to Show Cause.

On the entire record, the Board makes the following

Ruling on Motion for Summary Judgment

As stated by the General Counsel, the Respondent's answer to the third amended compliance specification admits that the recalculated backpay for Hinson, Kennedy, and Mantecon is consistent with the Board's Supplemental Decision and Order Remanding. Nonetheless, the Respondent denies that Hinson, Kennedy, and Mantecon are entitled to any backpay, persisting in positions litigated in the hearing on the first amended compliance specification. These positions were expressly rejected by the Board in its Supplemental Decision and Order Re-

[1] A fourth discriminatee (Merri Rowe) was included in the remand, but she is not at issue here.

manding, issued in September 2001. It is well settled that issues litigated and decided in an earlier phase of a backpay proceeding cannot be relitigated in a later phase. See, e.g., *Laborers Local 135 (Bechtel Power Corp.)*, 311 NLRB 617 (1993), enfd. 148 LRRM 2640 (3d Cir. 1995). See generally *Laredo Packing Co.*, 271 NLRB 553 (1984). The Respondent's answer to the third amended compliance specification is a clear attempt to relitigate issues decided adversely to it in the initial phase of this backpay proceeding.

Paragraphs 1 through 3 of the third amended compliance specification set forth the backpay periods for Hinson, Kennedy, and Mantecon, respectively. Paragraph 4 defines "gross backpay" as the "amount of earnings [the discriminatees] would have received but for Respondent's discrimination against them." In its answer,[2] the Respondent admits the backpay periods and accepts the definition of "gross backpay" as a "general concept." However, the Respondent denies that the discriminatees were entitled to any backpay. In this regard, the Respondent claims that inadequate mitigation efforts were made.[3] In the initial phase of this compliance proceeding, the Board examined the reasonableness of the discriminatees' mitigation efforts, and rejected the Respondent's arguments that they were unreasonable. 335 NLRB 1117, 1118 (Hinson), 3 (Mantecon), and 5 (Kennedy). The Respondent cannot relitigate the adequacy of the discriminatees' mitigation efforts here.

Paragraph 5 sets forth a formula for determining an appropriate measure of gross backpay, using a representative group of production employees, and "averages" derived from that representative group. Paragraphs 6 through 9 and paragraph 14, successively set forth the representative group of employees (par. 6), and the "averages," specifically: average overtime hours (par. 7), average absence rate (par. 8), average mentor training bonus (par. 9), and average Attaboy bonus (par. 14). The Respondent admits that the employees of the representative group were all of the hourly production employees in the relevant departments hired in the relevant time period, and that the averages were properly derived from the representative group, but submits that an appropriate measure of gross backpay is "based on the individual work histories." The Respondent raised the identical argument in the first phase of this backpay proceeding. The Board rejected the argument, finding no merit in the Respondent's general attack on the comparable employee formula. The Board found that the use of "average absenteeism" was consistent "with the use of average overtime and bonuses of the comparable employees," and found "no merit" to the Respondent's exceptions that the Region "inappropriately used the comparable employees' average overtime hours and bonus earnings." 335 NLRB at 1117 fn. 3.

Paragraph 10 sets forth the Piece of the Action (POTA) bonus due the discriminatees. A POTA bonus was included in the original compliance specification. Here, the Respondent argues that the discriminatees are not due the POTA bonus. Respondent claims that inadequate mitigation efforts were made. As stated above, this argument has been unqualifiedly rejected.

Paragraph 11 sets forth unpaid holidays. The Respondent admits this paragraph.

Paragraphs 12 and 13 relate to paid holidays and paid vacation shutdowns. As with the POTA bonus, paid holidays and vacations were included in the original compliance specification. Again, the Respondent's only argument is that the discriminatees are not due paid holidays and vacations due to inadequate mitigation efforts. And again, the Board has previously rejected that argument.

Paragraph 15 sets forth the pay scale in effect during the backpay period and the dates each discriminatee would have advanced to the next pay level. The Respondent argues that employee applications to take tests for the next level are frequently denied, and that the Region has not produced evidence that these discriminatees would have applied for, taken, and passed the necessary test to advance to a higher pay level.[4] This argument is a variation on the theme it advanced in the earlier phase of this backpay proceeding—that the Region's approach to measuring "average" pay level advancement was flawed because it did not account for numerous employees who "peaked or parked" at a particular pay level. The Board found merit to that exception and ordered the Region to recalculate "average pay level advancement" according to certain directions with which the Region has now complied. Otherwise, the Respondent's argument is an

[2] The Respondent's answer corresponds numerically to the paragraphs of the third amended compliance specification; thus, par. 1 of the compliance specification is answered by par. 1 of the answer, etc.

[3] Par. 1 also alleged that the 1996 reinstatement offer to Hinson, while sufficient to toll backpay owed her, was insufficient to relieve the Respondent of its obligation to reinstate Hinson. The Respondent denies that allegation, and says that it offered employment to Hinson in 1998. Since Hinson declined that offer, there is no "live" controversy remaining over any reinstatement obligation.

[4] The Respondent also denies that app. E to the compliance specification accurately represents the pay scale in effect as of October 1996. This denial does not raise a substantial issue, because the Respondent has admitted that the discriminatees' backpay periods ended *before* October 1996 (except for Kennedy's, whose period ended on October 3, 1996, with de minimis effect, at best). Moreover, a mere denial of the compliance specification on this issue is insufficient since the Respondent has failed to supply the figures in its possession to verify its denial. See Sec. 102.56(b) of the Board's Rules and Regulations.

extension of its previous argument that the Board should not use a comparable employee approach (but should, instead, look at individual work histories). As stated above, the Board previously affirmed the appropriateness of the comparable employee formula.

Additionally, the Respondent, while admitting that it revised its pay scales in November 1993, denies that it did so on November 15, 1993. If this denial is an attempt to allege some difference in calculations based on the date that the Respondent actually revised its pay scale in November, that attempt must fail. The date that the Respondent revised its pay scale is a matter within the Respondent's knowledge. Section 102.56(b) of the Board's Rules and Regulations provides that, as to all matters within the respondent's knowledge, including the various factors entering into the computation of gross backpay, if the respondent disputes either the accuracy of the figures or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures. See also *Shenandoah Coal Co.*, 312 NLRB 30 (1993), citing *Best Roofing Co.*, 304 NLRB 727, 728 (1991). Here, the Respondent has furnished neither a specific alternative date nor any alternative figures. Section 102.56(c) of the Board's Rules and Regulations provides that, if the respondent files an answer but fails to deny an allegation of the specification in the manner required by paragraph (b), and the failure to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation. Because the Respondent has failed to comply with the Board's specificity requirements, the Board deems paragraph 15 admitted. *Baker Electric*, 330 NLRB 521 (2000).

Paragraphs 16 and 17 define "calendar quarter net interim earnings" and "calendar quarter net backpay." The Respondent admits these two paragraphs.

Finally, paragraph 18 defines "total net backpay" and specifies the amount due to each discriminatee, as set forth in attached appendices. The Respondent admits the "concept" of total net backpay, but denies the accuracy of the figures in the appendices based on its arguments in its answer and previous exceptions to Judge Linton's October 28, 1999 supplemental decision. These arguments were rejected.

In sum, the Respondent's efforts here are directed toward relitigating issues previously litigated and decided in the initial phase of this compliance proceeding. The Board rejects this effort, deems admitted all paragraphs of the third amended compliance specification not specifically admitted by the Respondent; and grants the General Counsel's Motion for Summary Judgment. Accordingly, we conclude that the net backpay due Martha Hinson, Jerry Kennedy, and Manuel Mantecon is as stated in the third amended compliance specification and we will order payment by the Respondent of those amounts to the discriminatees, plus interest accrued on the amounts to the date of payment.

ORDER

It is ordered that the General Counsel's Motion for Summary Judgment is granted.

IT IS FURTHER ORDERED that the Respondent, Performance Friction Corporation, Clover, South Carolina, its officers, agents, successors, and assigns, shall make whole the individuals named below by paying them the amounts following their names, plus interest[5] and minus tax withholdings required by Federal and State laws:

Martha Hinson	$26,973
Jerry Kennedy	11,738
Manuel Mantecon	5,438

[5] Interest shall be computed as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).